86-1202

Supreme Court, U.S.
FILED
DEC 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES GERALD WILSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, 2ND DISTRICT, DIVISION 5

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QUESTION PRESENTED

If the County prosecutor has an improper out-of-court contact and an unauthorized ex parte communication with a trial juror during trial, coupled with other improper and inflammatory conduct in the courtroom, are such actions grounds for a reversal and remand or a dismissal?

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This is a prosecutorial misconduct case. The petitioner, CHARLES GERALD WILSON, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California which was filed on October 29, 1986. Since that judgment was an "Order Denying Review" after a judgment of the California Court of Appeal,

Second District, Division Five, this Writ, in effect, is also a review of that judgment by the Court of Appeal.

OPINION BELOW

On October 29, 1986, the Supreme Court of the State of California denied petitioner's "Petition for Review" which in effect left standing the unpublished opinion of the "California Court of Appeal" which was filed August 8, 1986. Said opinion affirmed a judgment of conviction of vehicular manslaughter (California Penal Code Section 192, Subdivision 3(a)(2), driving while under the influence of alcohol with bodily injury (California Vehicle Code Section 23153) and driving with a .10 percent or more of blood alcohol level with injury (California Vehicle Code Section 23153.) The one page copy of the "Order Denying Review" by the California

Supreme Court is attached hereto as Appendix "A". The unpublished opinion of the California Court of Appeal is attached hereto as Appendix "B".

JURISDICTION

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall...be deprived of life, liberty, or property, without due process of law..."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the acused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed..."

United States Constitution, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

In September 1983, petitioner was charged with a violation of the California Penal Code section for felony manslaughter and with what is commonly called drunk driving with injury. (Clerk's Transcript p.p. 280-283, hereinafter called "C.T.").

Petitioner pled not guilty (C.T. 287). The jury at petitioner's first trial deadlocked and the court declared a mistrial (C.T. 402). Petitioner was found guilty as charged at his second jury trial (C.T. 504).

From the outset, it must be made clear that this case was in large measure an

accident reconstruction case. The essence of the defense was that, although petitioner was clearly driving under the influence of alcohol, neither that fact nor any other act of petitioner was a proximate cause of the collision and the consequential death to the other driver. Thus, in one sense, the case proceeded as if it was a tort trial with criminal rules. Which accident reconstructionist was to be believed? Which percipient witnesses who formed the basis of the accident reconstructions were to be believed?

Both sides had arguably plausible theories on the crash dynamics, given by experts in the field. The outcome clearly could have gone either way. It is this closeness of the case on the merits that forms part of the substantial basis for this petition. Petitioner adamently contends that

the misconduct of the prosecutor, not only in the courtroom, but by an ex parte contact with a trial juror, tipped a very delicate balance in the State's favor.

The State's expert stated that petitioner was going 92 miles per hour on a surface road and running the red light when the crash occurred. (Reporter's Transcript pp. 1738-1742, hereafter called "R.T."). Contrarywise, petitioner's expert stated that petitioner's vehicle was making a left turn at about 12.5 miles per hour, and it was the decedent who ran the red light at a high rate of speed in excess of 70 miles per hour. (R.T. 2432-2482.)

Both trials were approximately five (5) weeks long. On Tuesday, January 29, 1985, just three days before the second trial ended, and after having been in that trial since December 4, 1984 (excluding the

holidays), the prosecutor came into the court and told the judge and defense counsel of his contact with a juror the afternoon before. (R.T. 3130). The prosecutor, Mr. LAWRENCE WOLFE (hereinafter called "WOLFE"), made the following statement:

> "Yesterday on the way home, I saw one of the jurors, the old guy in the front row, who was standing outside in the rain looking very distressed talking to the guard over there, you know, where you park your cars. And as I got closer, he walked by me muttering about his battery, he had evidently stalled. I said, 'Would you like a jump?' He said, 'Yes.' I drove my car up, he put the cables on, and started his car. That's it. But I wanted to tell you because somebody may have seen my car drive up to the juror's car and me open my hood and have him do that. And you have a right to know that. So I gave him a start, he started his car, and he thanked me. End of report." (R.T. 3130).

Thereafter, Juror RANTA, the name of the juror in question, was questioned on the record and his comments deserve express

quotation:

"The Court: Anything that you think would cause you to feel that you are obligated to help Mr. WOLFE because of the assistance that he gave you?

Juror RANTA: No. I was very appreciative of his help, but that is just like one person to another. But I would just like to add, if there is any question that this might bring up a cause for a mistrial or anything like that, I would rather withdraw now and let an alternate step in rather then let the time and effort that has already been expended go down the tube.

The Court: I think I am going to do that, Mr. RANTA. I am reluctant to take you off, but, by the same token, I have no assurance--well, you didn't see them and Mr. WOLFE said he didn't see them--I have no way of knowing if anybody else may have seen you.

Juror RANTA: True.

The Court: And I am going to excuse you. I will put an alternate on in your space.

Juror RANTA: Okay." (R.T. 3134)

At a much earlier stage of the proceedings, during voir dire, Juror RANTA was questioned by WOLFE. Facts were elicited that would lead a reasonable person to believe that the District Attorney might not consider Mr. RANTA a very good Juror for his side. (R.T. 366-369.) In fact, Juror RANTA stated that he had drunk a fifth of alcohol in two hours at one time and that he had personal knowledge with amnesia because his son had amnesia from a fall. (R.T. 366-368.) (Please note also that petitioner testified at trial that he had partial amnesia from the impact.) Nonetheless, WOLFE was eventually "stuck" with Mr. RANTA since he had used up all of his peremptories on others.

After WOLFE's disclosure, a defense motion for mistrial and/or dismissal was denied. (R. T. 3136-3138).

Finally, the Trial Judge individually

examined each juror in turn, out of the presence of the others. While no juror was apparently told of WOLFE's contact with Juror RANTA, it is quite significant that Juror SHAW was told by Juror RANTA that a "Good Samaritan" had helped him jump start his car. (R.T. 3192).

REASONS FOR GRANTING THE WRIT

The very integrity of the jury system itself demands a review of this most unusual case and a dismissal, or at the very least, a reversal and a remand after review.

Quite frankly, after extensive research, petitioner has found no case which is substantially on point with respect to a prosecutor's having had such contact with a juror during trial, as in the case at bar. Even a search of secondary source material does not disclose a case similar to the facts

herein with respect to the misconduct of a prosecutor. (Please see Gershman, Bennett L., Prosecutorial Misconduct, Clarke-Boardman Company, Ltd., New York, New York (1985).) In one sense, it is not at all surprising that there is little or no case authority for such prosecutorial behavior. One would hope to find very few prosecutors who would not have known better than to engage in such shabby conduct during trial.

On the other hand, there does exist the case of In re Possino, 37 Cal.3d 163 (1984), which does involve similar misconduct on the part of a private attorney who happened to be a defendant as well. While the Possino case is a disciplinary proceeding, the language in that opinion is very relevant to the problem herein, i.e., the fact that there was a direct violation of a rule of professional conduct governing the gross impropriety of an

attorney's ex parte contact with a juror during trial.

Even more importantly, is it not the rule that the prosecutor and his duty of care are held to a higher standard than that of a private attorney as in the Possino case? The answer quite clearly is yes. Such a higher duty of care can be seen in many cases and in particular from the following quote from this Court. Although this quote specifically applies to a U. S. Attorney in the case cited, it equally applies to any prosecutor in America:

> "The United States Attorney is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not

> escape or innocense suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Berger vs. U.S., 295 U. S. 78, 88 (1935).)

Prosecutors and defense attorneys are cautioned from the outset of a criminal trial not to have any contact with jurors, and likewise, jurors are routinely admonished that should they at any time encounter the parties for either side, they must not engage in any form of conversation with them.

In the ABA standards relating to the Prosecution Function, Section 5.4, the responsibility of a prosecutor is explained as follows:

> (a) It is unprofessional for the prosecutor to communicate privately with persons summoned for jury duty or impanelled as jurors concerning

> the case prior to or during the trial. The prosecutor should avoid the reality or appearance of any such improper communications.
>
> (b) The prosecutor should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience. (Emphasis added) (1980).

Furthermore, Rule 7-106(B) of the California Rules of Professional Conduct provide in pertinent part as follows: "(d)uring the trial of a case: (1) a member of the State Bar connected therewith shall not communicate directly or indirectly with any member of the jury..."

Likewise, in the ABA code, Ethical Consideration 7-36 states in pertinent part as follows: "... A lawyer should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special

consideration."

Finally,, The "Code of Trial Conduct" (1972 Revision) of the American College of Trial Lawyers states in pertinent part under Rule 20 as follows: "...(d) During the trial of a case, a lawyer connected therewith should not communicate with or cause another to communicate with any member of the jury..." Section (i) of that same rule states as follows: "A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience or the like." (Emphasis added).

Thus, it is patently clear that every conceivable rule of proper trial decorurm abhors such conduct. Regardless of the motives of the prosecutor, it is essential

that this Court not condone such actions. Contact with a juror that necessitates his removal is akin to tampering with the jury and cannot be viewed as merely innocent misjudgment.

Petitioner also contends that the contact with Juror RANTA cannot be viewed as insignificant. Contact with a juror is an act that the prosecutor easily could have avoided--and should have avoided as an officer of the court and representive of the People. The Court must not overlook that a public prosecutor's duty is more comprehesive than the simple obligation to press for convictions.

Notwithstanding the minimal case law regarding this precise factual situation, petitioner strongly urges this Court to appreciate the serious situation created by a prosecutor's disregarding such a key

principal of trial advocacy. Due process, the orderly administration of justice, and the promoting of a fair trial demand nothing less than a severe rebuke of this type of behavior.

Such conduct cannot possibly comport with even the most minimal standards of Due Process since, in effect, petitioner's voir dire rights were obliterated by the prosecutor's actions.

In other words, if the Court allows such a procedure as occurred in the present case, the Court is saying to all prosecutors that it is appropriate for them to break the Rules of Professional Conduct in order to gain, in effect, further peremptory challenges beyond the statutory limit, as long as there is an alternate juror selected by both sides to take the place of the one who leaves because of the taint from the prosecutor's contact.

Nothing in logic, fairness, or Due Process justifies such rule if the goal truly is to have a fair and impartial trial by jury for the defendant in a criminal case.

Also, please note that with regard to any reasonable inferences as to the motivations of WOLFE in initiating the contact with Juror RANTA, petitioner draws the Court's special attention to page 3139 of the Reporter's Transcript. It is quite apparent from WOLFE's comments that his intentions were to have the juror excused. "We've got two alternates. Does he (defense counsel) wish to excuse the juror? That is really the question." (R.T. 3139). "Do you (defense counsel) want to voir dire? It is a two way sword because you are afraid you may alienate him." (R.T. 3135).

The following statement of WOLFE is also

most curious: "On the record, if counsel were correct, I wouldn't have told you about it. Because he (Juror RANTA) certainly wasn't going to tell you anything about it. So counsel is talking out of his nose and not out of his intellect. If I really wanted to do it, I wouldn't have mentioned it." (R.T. 3130). Query, how did WOLFE know that Juror RANTA was not going to tell anyone about anything? (Afterwards, the trial judge refused defense counsel's request to examine WOLFE under oath about the incident in order to determine the motivations of WOLFE.)

It was quite obvious that WOLFE's attitude was that he had done nothing wrong, "I am not going to leave that guy standing out in the rain for a start" (R.T. 3137), and any problem was a minor one that should be corrected by actions or requests from the defense counsel and/or the court. (R.T.

3182-3189).

Quite frankly, and with all due respect to the California Supreme Court and the California Court of Appeal, what is quite astonishing is the statement in the Appellate Opinion below as follows:

> "The District Attorney's explanation is reasonable--he responded to the need of another, person to person, not District Attorney to Juror. That his response may be a technical violation of the ethical code does not mean that the prosecutor acted in a manner calculated to gain advantage during trial." (Appendix II, pages 7-8).

The reason this statement is most curious is that it proves the exact point that petitioner wishes to make here, i.e., it is just such "person to person" contacts with a juror during trial that <u>all</u> of the rules of ethical and professional conduct are meant to prevent. The very essence of a fair jury trial is the <u>objectivity</u> of the jurors,

not the personal feelings, "person to person", which jurors may have with any particular attorney in the case. The bedrock of a fair jury trial rests on the relationship between any one juror and any one attorney to continue to be "attorney to juror" and not "person to person." This fundamental concept was totally ignored by the intentional act of Mr. WOLFE and there was no good reason for it, quite apart from any "motive" he may have had in such contact. (Please remember, the trial judge told WOLFE he should have had someone else help Mr. RANTA if he really wanted to be of assistance and that what he did was "wrong".)

Apparently, the California Courts below would have the Supreme Court believe that, at worst, this is an ordinary "run of the mill" case of prosecutorial misconduct, and therefore should be treated with the

traditional rules involving such concepts as "harmless error" and whether or not it is reasonably probable that a result more favorable to defendant would have occurred had the misconduct not occurred. Unfortunately, the type of misconduct displayed here impales the integrity of the jury system to such an extent that the old rules cannot apply.

Certainly, there was traditional "good cause" to excuse Juror RANTA but it is significant that it was prosecutor-induced "good cause". If such conduct as WOLFE's is not deemed to be improper, and met with very strong sanctions such as reversal and remand or dismissal, then what is to prevent a prosecutor from approaching any juror whom he does not like in the middle of the trial, and then immediately report it to the court and the defense attorney in order to have that

juror removed? Logically, if the prosecutor can do it once, why can he not do it twice. Is three times too many? Four times? Where does it end?

The point is this: It is just this type of cavalier attitude displayed at virtually every level below on this appeal that mandates this Court to oppine a specific rule proscribing such misconduct. Therefore, at the risk of sounding presumptuous, petitioner respectfully offers to this Court the following rule of law to prevent such prosecutorial abuse:

> In a case where there is prosecutor-induced "good cause" for the dismissal of a juror, and that inducement is a result of specific, and articulable prosecutor misconduct such as a direct and specific violation of a Rule of Professional Conduct, then at least a reversal per se is requried even without a showing of prejudice or a close case on the merits.

While petitioner adamantly contends that this in fact is a close case on the merits and that there was gross prejudice to him, at least a reversal is required notwithstanding a showing of either. (Of course, a dismissal is warranted here based upon the totality of the misconduct and the Double Jeopardy issues that were explained below and will be fully explained should a Writ be granted). Otherwise, what is there to prevent other prosecutors, and even WOLFE himself, from any further tampering with the jury process? If this case is allowed to proceed on a "business as usual" basis, it will make a mockery of the classic admonition given by the trial judge for the jurors not to have any contact with attorneys, parties or witnesses in the case during the pendency of the trial. (Such an admonition had already been given approximately "82 times" during

the second trial by the time Mr. WOLFE talked with Juror RANTA outside the courtroom.)

Due to space limitations in this Petition, petitioner cannot outline for this Court the numerous other instances of prosecutorial misconduct. On the other hand, one particular example of such misconduct, on an extremely important issue in the trial, will be outlined briefly.

The only "eye-witness" to the entire accident was one ESTHER MARTINS. Her version of what occurred was totally in line with the defense version, i.e., the decedent's vehicle was running the red light at a high rate of speed, not petitioner's vehicle. In closing argument, WOLFE stated that ESTHER MARTINS is a "self-admitted alcoholic" (R.T. 3254). This was simply not true. The Court sustained an objection. Unfortunately, however, the Judge in front of the Jury in

effect supported such improper argument by stating: "It was in a prior trial, but not at this trial." (R.T. 3254.) In other words, WOLFE, and quite inadvertantly the Court, allowed improper evidence in a crucial issue in the case, i.e., the credibility of the only eye-witness to the accident, particularly since that eye-witness supported the defense version of how the accident occurred. Then to compound the matter, WOLFE continued to emphasize this completely improper evidence by stating: "And then about ESTHER MARTINS, whether she is an alcoholic or not, I think the Judge said well, that was the last trial..." (R.T. 3281). (Emphasis added.)

Of course, there are many, many more instances of the same type of improper conduct creating a circus atmosphere in the trial. The above-mentioned theme, in fact,

is particularly damaging since the credibility and ability to perceive of ESTHER MARTINS was so crucial to the defense. For the District Attorney to continue to hammer on a theme that ESTHER MARTINS was an "alcoholic", when there was no evidence in the second trial to that effect, was totally improper and extremely prejudicial to a key part of the case. What possibly could the defense side do since the Judge stated that such testimony was in the "prior trial"? This was most certainly one bell that could not be unrung regardless of any admonition or otherwise. Its effect was absolutely devastating.

In conclusion, there are three particular Federal cases which directly involve the "Double Jeopardy" issue but, more importantly here, also are illustrative of the type of case which warrants a mistrial.

The Gershman book on Prosecutorial Misconduct, supra, analyzed this line of cases as follows:

> "In three Federal cases barring retrial under the objective test of prosecutorial misconduct, inadmissible and highly prejudicial evidence was placed before the jury. In U. S. vs. Martin, (561 Fed.2d 135 (8th Cir. 1977)), the prosecutor disobeyed the Court's ruling by reading to the Jury excerpts from the defendant's Grand Jury testimony which included statements that the Court had previously stricken, as well as prejudicial remarks in the Grand Jury by Jurors and the prosecutor. In U. S. vs. Kessler, (530 Fed. 2d 1246 (5th Cir. 1976)), the prosecutor brandished in front of the Jury an automatic rifle falsely representing that it was linked to the conspiracy and introduced inadmissible statements from a person whom the prosecutor knew had no connection with the conspiracy. In each case, the prosecutor's misconduct seriously undermined the defendant's right to a fair trial and left him with no choice but to move for a mistrial. Both Courts characterized the misconduct as either grossly negligent or intentional. In U. S. vs. Broderick, (425 Fed.Supp. 93, 96 (S.D. Fla 1967)), the prosecutor

> disregarded the Court's several instructions and elicited inadmissible and highly damaging hearsay testimony to prove that the defendant transported illegal aliens into the United States. The Court found that the prosecutor's aggravated and persistent misconduct seriously prejudiced the defendant and warranted not only a mistrial because a continuation of the tainted proceeding would probably result in a convictions, but also a bar to retrial." (Id. at page 11-15, 11-16). (Emphasis added.)

Of course, it is true that the above Federal cases must be read in light of Oregon vs. Kennedy, 456 U. S. 667 (1982), particularly with respect to the "Double Jeopardy" language. However, without dwelling on the "Double Jeopardy" aspects of these cases, and instead by concentrating on the "prosecutorial misconduct" aspects of these cases, in one sense the facts in the case at bar are even more egregious than the facts in Martin, Kessler, and Broderick. Certainly, WOLFE must have known that his actions had to

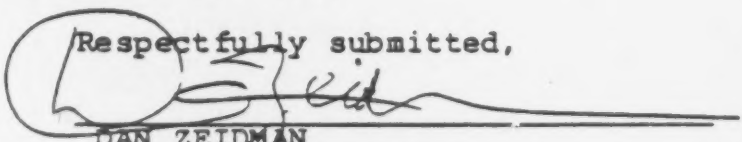
result in one of two things; either the dismissal of Mr. RANTA or having a tainted jury remain. How can any Court view what charitably can be called grossly negligent jury tampering any more favorably than the misconduct shown by the cases above? In either instance, any semblance of Constitutional Due Process is absent.

CONCLUSION

For the foregoing reasons, petitioner CHARLES GERALD WILSON respectfully requests that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of California and, by extension, the Appellate Opinion of the California Court of Appeal, Second District, Division Five.

Dated: December 24, 1986

Respectfully submitted,



DAN ZEIDMAN
Attorney for Petitioner

Appendix A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, No. B011904

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

CHARLES GERALD WILSON

Petitions for review of Appellant DENIED.

_____BIRD_____
Chief Justice

Appendix A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,	) 2d Crim. No.B0111904
	) Super.Ct. No. A565037
Plaintiff and Respondent,	)
	) FILED AUGUST 8, 1986
v.	)
	)
CHARLES GERALD WILSON,	)
	)
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Xanthos, Judge. Modified and affirmed.

Thacher, Hurst, Conaway & Zeidman and Dan Zeidman for Defendant and Appellant.

Randy Sue Pollock as amicus curiae on behalf of Defendant and Appellant.

John K. Van de Kamp, Attorney General, Hark Alan Hart and Alsion Braun, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX B

This appeal follows a conviction of vehicular manslaughter (Pen. Code, Sect. 1/ 1982, subd. 3(a)), driving while under the influence of alcohol (Veh. Code, Sect. 21353, subd. (a)), and driving with a .10 percent or more blood-alcohol level (Veh. Code Sect. 2/ 23152, subd. (b)).

The accident which led to the conviction was a tragic one.[3/] Appellant Gerald Wilson

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1. At the tme appellant was charged, Penal Code section 192 had numbered subdivisions and lettered paragraphs. The section was amended in 1984 and the numbered subdivisions were redesignated as lettered subdivisions with numbered paragraphs.

2. In the first trial of this case the jury was deadlocked, and a mistrial was declared.

3. Our statement of facts is based on our standard of review: view the evidence in a light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (People v. Johnson (1980) 26 Cal. 3d 557, 567.)

was 53 years old at the time of trial. He worked for Pacific telephone since 1956. Appellant was a good citizen without a criminal record of any kind, a husband, father, and prior to the date of the accident, a moderate drinker. But in the early morning hours of April 6, 1983, appellant, driving 92 miles per hour northbound on Huntington Drive with a stipulated blood-alcohol level of .22, ran a red light. His car collided with the car of the victim, 28-year-old Jeffrey Woodward, whow was traveling east on Santa Clara. Mr. Woodward was killed instantly.

Appellant's accident reconstructionist testified that appellant was traveling east and turning left at 12.5 miles per hour when Mr. Woodward sped through the red light at 72 miles per hour while going north on Huntington Drive, and hit appellant's car.

The only eyewitness was called by the People. Her testimony, that she saw the small dark car (the victim's Datsun) run the red light, was helpful to the defense. Yet, the witness's credibility wwas attacked by the People through the use of prior inconsistent statements and her admissions that she had herself been drinking the night of the accident.[4/]

Appellant was sentenced to two years, the midterm on the manslaughter count, and one-third the midterm or eight months on the driving under the influence count pursuant to Vehicle Code section 23153, subdivision (a). The eight months is consecutive to the two years. Appellant also received eight months

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4. In light of the issues raised on appeal, no further factual discussion will be given as such. Facts will be incorporated as need be into the discussion of appellant's contentions.

on the Vehicle Code section 23153, subdivision (b), count, which was stayed.

Appellant's contentions on appeal center around allegations of prosecutorial misconduct. Finding none, we affirm the judgment, though we modify it with respect to the sentence. Appellant challenges the sentence based on Penal Code section 654. We agree that his sentence violates the prohibition against double punishment and stay the consecutive sentence pursuant to section 23152, subdivision (a), in addition to the sentence prusuant to section 23153, subdivision (b), that was stayed by the trial court.

DISCUSSION

I

Appellant seeks a reversal of the judgment on the grounds of prosecutorial

misconduct based on the following incident. During trial, the deputy district attorney who was trying the case gave a jump-start to one of the jurors on the same case. The juror, Mr. Rant, was unable to start his car. It was raining and getting dark. Mr. Ranta was described by the district attorney as "the old guy," who was, at the time of the incident "looking very distressed." The district attoroney told the court and defense counsel at his first opportunity the next morning. Defense counsel, after consulting with appellant, requested mistrial. the motion for mistrial was denied. The trial court instead voir dired Mr. Ranta in chambers. Though Mr. Ranta assured the court that he would not be influenced by the prosecutor's act, the trial court took the precaution of excusing him. An alternate juror was appointed.

That afternoon defense counsel requested that each remaining juror be questioned individually about whether Mr. Ranta told them of the incident. He renewed his mistrial motion. The trial court interviewed each juror; none of the jurors knew anything about the district attorney helping Mr. Ranta. The trial court again denied the motion for mistrial.

Appellant cannot and does not show any prejudice he suffered as a result of the district attorney contact with the juror. Any possible prejudice was immediately eliminated by the removal of Mr. Ranta from the panel.

Appellant seeks a reversal of the ground that there was a contact between the district attorney and Mr. Ranta. He cites no authority for this proposition except a bar

misconduct case, In re Possino (1984) 37 Cal. 3d 163.[5/] Appellant relies on language in Possino in which the court describes attorney contact with a juror outside the courtroom during trial as "unethical." (Id. at p. 170.)

On appeal the standard of reversal for a charge of prosecutorial misconduct where the issue has been preserved for appeal by objection is whether a result more favorable to defendant would have occurred had the prosecutor refrained from the challenged action. (People v. Haskett (1982) 30 Cal. 3d

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5. Amicus curiae in support of appellant cites People v. Orchard (1971) 17 Cal. App. 3d 568. In Orchard appellant stated in an affidavit in support of his motion for new trial that he saw the prosecutor talking to the jury foreman during a trial recess. (Id. at p. 575.) The appellate court found that the incident did not constitute misconduct per se and ruled, in accordance with our ruling herein, that appellant must demonstrate prejudice. (Id. at pp. 575-576.)

841, 866.) In light of the swift action and thorough investigation undertaken by the trial court, we cannot say that the prosecutor's act of helping Mr. Ranta affected the outcome of the case. To put it in the words of the test on appeal, we cannot say that appellant would have gotten a more favorable judgment had the district attorney not helped Mr. Ranta to start his car.

Appellant next contends that the district attorney forced the trial court into allowing the alternative juror procedure to be used in an improper way: Mr. Ranta was a juror selected by defense with one peremptory challenge left and selected by the prosecution with no peremptories left. He argues that if the district attorney had a peremptory left at the time propsective juror Ranta was questioned on voir dire, he would

have exercised it. The voir dire of Mr. Ranta, as appellant explains, elicited facts which would lead a reasonable person to believe that the district attorney would not want Ranta on the jury.[6/] Therefore, the district attorney intentionally made contact with juror Ranta to accomplish the subterfuge that he was unable to accomplish while picking the panel -- removing Ranta from the jury.

This is a preposterous explanation for the district attorney's action. It is built on sheer speculation and straw-grasping. The district attorney's explanation is reasonable

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6. Mr. Ranta stated that he once drank a fifth of alcohol in two hours and his son suffered from amnesia from falling out a window. The latter is of import, we assume, because appellant was unable to recall much of whwat he did during the two hours before the accident or anything after until he woke up in the hospital.

--he responded to the need of another, person to person, not district attorney to juror. That his response may be a technical violation of the ethical code does not mean that the prosecutor acted in a manner calculated to gain an advantage during trial.

Obviously, we find no error in the trial court's denial of appellant's motion for mistrial based on the Ranta incident, of which appellant also complains. The trial court is vested with considerable discretion in ruling on a mistrial motion. (People v. Haskett, supra 30 Cal. 3d at p. 854.) No showing of an abuse of discretion has been made.

II

Appellant complains of improper statements of law made by the district attorney to the jury during trial. The statement of law complained of was the

district attorney's statement of the basic speed law[7] and how it related to the case, made during voir dire of the prospective jurors. The district attorney asked two prospective jurors if they could conceive of a driver being so intoxicated that a reasonable and prudent speed would be zero. The first defense objection was overruled. After the second objection and a lengthy bench conference, however, the court sustained the defense objection, admonished the jury and instructed on the basic speed law, i.e., that all the circumstances surrounding the driving must be taken into

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7. The basic speed law is as follows: "No prson shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." (Veh. Code, Sect. 22350.)

consideration. The defense, unhappy with the instruction, requested further instruction to clarify the defense understanding of the basic speed law. The court denied the request. Defense requested a mistrial, which was denied.

To begin with, any harm which may have been caused by the prosecutor's statements was cured by the trial court's instruction. (See People v. Green (1980) 27 Cal. 3d 1, 34: "(I)t is not difficult to conceive of prosecutorial misconduct that if uncorrected would 'contribute materially to the verdict,' yet remains easily curable by a prompt instruction to the jury; a misstatement by counsel of a controlling rule of law comes immediately to mind.")

Appellant argues that the harm was not cured, based on the following. After the

trial, his attorney spoke to one of the jurors, Mr. Duran, who told him, "We just felt that (appellant) should not have been on the road at all."[8/] Appellant argues that this statement shows the jury was contaminated with respect to the most important defense to the case, that it was Mr. Woodward, not appellant, who caused the accident. But that statement does not sufficiently establish prejudice to appellant's case. First of all, the statement is only an approximation of what juror Duran said. Furthermore, it does not show that Duran's attitude resulted from the district attorney's questions on voir dire. Where objection is made on the grounds of prosecutorial misconduct and an admonition is given, it is presumed that the

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8. The statement appears as a hearsay statement in the declaration of defense counsel, who is unable to remember the juror's exact words but states that the juror said this "in substance."

jury heeded the admonition and ther error was cured. (People v. Green, supra 37 Cal. 3d at p. 29 and cases cited therein.) Appellant may raise the issue again on appeal, but must show that the misconduct resulted in a miscarriage of justice. The appellate court then considers such factors as whether the evidence was close and defendant's guilt in doubt, whether the misconduct was deliberate and repeated and whether it was likely to have contributed materially to the verdict. (Ibid.) Because the misstatement of law occurred during voir dire and the court instructed the jury on the correct law immediately, because the misstatement was not repeated and because the jury was instructed again on the basic speed law before deliberating, we find no error, much less a miscarriage of justice.

Appellant takes issue with the trial court's instruction given to cure the misstatement. He maintains that the admonition was erroneous and only confused the jury more. The trial court told the prospective jurors: "...I think in one of the questions it was indicated that if a person under the influence drives so much, even zero miles per hour, it's conceivable ethat would be a violation of the basic speed law. (paragraph) That it is not the law. You will, of course, follow the law as I give it to you at the conclusion of this case. (Paragraph) The circumstances concerning the speed by which any vehicle is driven is to be measured by all of the circumstances surrounding the driving at the time that it took place, taking all of the factors into consideration. (Paragraph) That's a determination for the jury to make, whether

or not someone was driving, and at the time he was driving he was driving at a safe speed within the meanings of the basic speed law. (Paragraph) so to say that anyone who's under the influence of driving so much as zero miles per hour is not a correct statement of the law. You're to disregard that. (Paragraph) That will be your ultimate decision to make. If there is evidence of driving here and there's evidence of speed, whatever that speed may be, you as jurors, who are selected to hear this case, will make that determination as to whether or not the driving speed at the time was safe under the circumstances that were involved at the time of the driving."

We find this admonition proper. Thus, we find no error in the trial court's denial of appellant's motion for mistrial based on

the basic speed law instruction.[9]

III

Appellant raises 75 separate incidents of grossly inflammatory and improper statements of fact, improper side comments and attempts to testify by the district attorney. He argues that while these may not be so damaging if viewed individually, their cumulative effect is devastating.

Of these examples of prosecutorial misconduct, appellant objected to only 17 at trial. Where prosecutorial misconduct is raised for the first time on appeal, our initial question is whether timely objection and admonition would have cured the harm; if it would, the contention must be rejected.

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9. Because we affirm the trial court's denial of both motions for mistrial, we do not reach appellant's argument relating to the proper disposition upon reversal based on the trial court error in denying same.

(People v. Green, supra 27 Cal. 3d at p. 34.) Having reviewed every incident raised on appeal, we find appellant's characterization of the prosecutor's remarks to be greatly exaggerated. Most of the comments are proper. This is particularly true with respect to the comments taken out of context by appellant from the voir dire of the prospective jurors. As to any improper remarks, any harm wouold surely have been cured by admonition. Objection to these is deemed waived.

Where objection is raised at trial and admonition is given, we presume, as stated in section II, ante, that the error was cured. Should there be doubt as to the efficacy of the admonition we look to the record to see if a miscarriage of justice has occurred. In the absence of prejudice to the fairness of

the trtial, prosecutorial misconduct will not trigger reversal. (People v. Bolton (1979) 23 Cal. 3d 208, 214.) After reviewing the cited incidents of statements to which objection was made during trial, we conclude that appellant has failed to show these statements, either alone or cumulatively, deprived him of a fair trial.

IV

Appellant contends that the prosecutor's remarks about punishment and prejudice to the prospective jurors during voir dire were improper. The record shows the district attorney was attempting to locate any prospective juror who might improperly consider punishment and be swayed by their sympathy for appellant, a normally law-abiding, responsible, middle-class man. In the cases relied upon by appellant, the prosecutors during closng argument made

improper appeals for a guilty verdict by incorporating the concept of punishment into their arguments. (People v. Mendoza (1974) 37 Cal. App. 3d 717; People v. Sorenson (1964) 231 Cal. App. 2d 8.) These cases were distinguishable. Furthermore, the jury was given CALJIC Nos. 1.00 (1979 Revision) and 17.42, which instructed them not to be swayed by sympathy or to consider punishment in their determination of appellant's guilt or innocence. These instructions are consistent with the district attorney's questioning. Even if they were not, however, the instructions would cure any error by the prosecutor's questions on voir dire.

V

There is no merit to appellant's charge that the prosecutor took advantage of appellant's hearing loss. Appellant suffers

from a disease which affects his ability to hear. Following a full hearing, the trial court ordered a computerized X-Scribe system be used by appellant, by which the reporter's notes are immediately transcribed onto a computer screen to be read during trial. As to various references to that fact by the district attorney during trial, most are raised for the first time on appeal. We have no doubt that any harm caused by them would have been cured by admonition. As to the other comments, an objection was raised and sustained. There is no showing that any harm caused thereby led to a miscarriage of justice.

VI

Appellant's contention that he has been improperly sentenced is meritorious. Where a charge arising from a single act involves different offenses with different elements of

proof a defendant may be convicted of both. (People v. Tideman (1962) 57 Cal. 2d 574, 585-586.) But that act may be punished under either, not both, of the offensses. (Pen. Code Sect. 654.) Where the offenses involved are vehicular manslaughter and drunk driving, it is appropriate to sentence on the more serious offense. (People v. Seiterle (1963) 59 Cal. 2d 703, 712. See People v. McNiece (1986) 181 Cal. App. 3d 1048, 1064.) The error can be cured on appeal by permitting the sentence on the more serious offense to stand and to stay execution of the lesser. (People v. Milham (1984) 159 Cal. Ap. 3d 487, 507; People v. Rocha (1978) 80 Cal. App. 3d 972, 977.) We modify the sentence by staying the eight-month consecutive sentence imposed for the Vehicle Code section 23153, subdivision (a), violation. The two-year

sentence for vehicular manslaughter will remain, as will the stay imposed on the sentence imposed pursuant to Vehicle Code section 23153, subidivion (b).

The judgment, as modified, is affirmed.

NOT TO BE PUBLISHED.

ASHBY, J.

We concur:

FEINERMAN, P.J.

HASTINGS, J.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES GERALD WILSON,

Petitioner

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

DAN ZEIDMAN, being first duly sworn, deposes and says that he is a member of the Bar of the Supreme Court of the United States; that on January 16, 1987, the Corrected Petition for Writ of Certiorari in the above-entitled case was deposited in a United States post office mail box located in San Diego County, California, with priority

postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition, and with an additional copy being mailed to the following:

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Pasadena, CA 91101

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CONTINUED ON NEXT PAGE

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Dated at San Diego County, California, this 16 day of January, 1987.

DAN ZEIDMAN, Affiant

Subscribed and Sworn to Before me
this 16th day of January, 1987

Debra Lynn Rasner
Notary Public in and for said
County and State